

No. 11634

United States
Circuit Court of Appeals
For the Ninth Circuit

J. D. KECK and HARRY K. STAHLER, and
E. A. EMERSON and LEWIS EMERSON,
Husband and Wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

SEP 26 1947

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Eastern District of Washington, Southern
Division

No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,
vs.

CALIFORNIA SPRAY-CHEMICAL
CORPORATION, a corporation,
Defendant.

and

No. 242

E. A. EMERSON and LEWIS EMERSON,
husband and wife,
Plaintiffs,
vs.

CALIFORNIA SPRAY-CHEMICAL
CORPORATION, a corporation,
Defendant.
(Consolidated)

RECORD OF PROCEEDINGS AT THE TRIAL
January 27, 1947

Before: Honorable Sam M. Driver,
United States District Judge.

CECIL C. CLARK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Will you give us your name, please?

A. Cecil C. Clark.

Q. Where do you live, Mr. Clark?

A. Near Sawyer.

Q. And you're an orchardist?

A. Yes, sir.

Q. How long have you been in that business?

A. Oh, I started with my own orchard in 1916.

Q. Had a little experience with sprays, I suppose, have you? A. Yes, some.

Q. When did you learn of Elgetol, or Elgetol "30" first, do you know?

A. Oh, in the—I read about it in the trade journals through the year, I believe, of '43, and I inquired about it and got information on it through the winter of '44.

Q. Did you use it at all in 1943, Mr. Clark?

A. 1943? No.

Q. Did you use Elgetol in 1944? A. I did.

Mr. Hawkins: I object to this testimony, your Honor, for the reason that I can see no materiality, whether Mr. Clark used Elgetol is entirely imma-

(Testimony of Cecil C. Clark.)

terial. The question is what happened on Mr. Emerson's place, and on Mr. Keck's place. This is entirely without the issues.

The Court: What is the purpose, Mr. McKelvy?

Mr. McKelvy: Well, it all goes to the question, your Honor, of whether or not Dr. Regan here had reason to believe—whether or not due care, so-called, was being exercised by him.

The Court: Overrule the objection. You may proceed.

(Whereupon the reporter read the last preceding question and answer.)

Direct Examination

(Continued)

Q. What varieties did you use it on in 1944?

A. Yellow Transparents.

Mr. Hawkins: I again object, your Honor. The use of Elgetol on Yellow Transparents is not the use of Elgetol on Jonathans, Winesaps, or Romes, with which we're concerned here. Whatever results this man may have had from an application of Elgetol on Yellow Transparents certainly has no materiality in this case.

The Court: Will it be shown Dr. Regan knew of its use?

Mr. McKelvy: Yes, your Honor.

The Court: Overrule the objection.

(Testimony of Cecil C. Clark.)

Direct Examination
(Continued)

Q. What did you use it for, thinning, or mildew, or both?

A. It was intended for thinning.

Mr. Hawkins: I again renew my objection, and move that it be stricken. There is certainly not any connection between thinning and mildew control.

The Court: I think that came out on plaintiffs' case. Overrule the objection.

Direct Examination
(Continued)

Q. When did you apply the Elgetol in 1944? I don't mean the date, if you don't know it, but the stage of the trees.

A. About two days after the center bloom opened in the cluster, so that I figured there's a set, and then you can kill off the others; about mid-bloom, I presume.

Q. Did you talk to Dr. Regan about the use of this before you used it in 1944? A. I did.

Q. What did Dr. Regan tell you about the use of Elgetol, if you remember?

Mr. Hawkins: I certainly object to that, your Honor. That certainly has no bearing on this case.

The Court: Well, I'll sustain the objection. I don't see the materiality of that.

Mr. McKelvy: Well, I don't want to argue the

(Testimony of Cecil C. Clark.)

Court's ruling, but the purpose of it is this; the reasonableness of what Dr. Regan tells someone should be proven by what he told other growers in similar circumstances.

The Court: I think not. I'll sustain the objection.

Direct Examination
(Continued)

Q. Did you learn about Elgetol any place other than the trade journals before you used it in 1944?

A. Well, with my talks with Dr. Regan, yes.

Q. And did you talk with Dr. Regan more than once before you applied it in 1944?

A. Oh, yes; several times.

Q. Then you applied it after the king blossom, you've already told us, two or three days. How many trees or how much did you use?

A. Put it on about a half an acre.

Q. How many acres did you have?

A. We had one acre, and put it on half of it.

Q. And what result did you get so far as the spray was concerned?

A. Well, we had a very material assistance in thinning, and to our surprise, we controlled mildew, which had been a very severe problem in these apples. We controlled it on the half we sprayed with Elgetol, but the other half had a very severe infestation of mildew.

Q. Did that affect the crop at all, that year, the mildew?

(Testimony of Cecil C. Clark.)

A. Well, it affected the quality of the apples. It apparently affected the 1945 crop, because the half that we sprayed with Elgetol in 1945 had a fine crop, and the other half was almost a failure.

Q. So that I am sure we understand that, you mean the half you sprayed in 1944 had a good crop in 1945? A. Yes.

Q. I see; and the other half was a failure in 1945? A. Yes.

Q. How would you compare the results you got in controlling mildew with any other spray you had used before?

A. Well, it was much better than anything we have ever used for mildew.

Q. How large an orchard do you operate, Mr. Clark?

A. About two hundred and fifty acres.

Q. And did you have a serious mildew problem in these apples you told us about, in 1944?

A. Yes, we have had a serious problem with mildew ever since we had it.

Q. Now, did you use Elgetol in 1945?

A. I did.

Q. And on what trees, and for what purpose?

A. Well, I used it on this acre, and then on about three other acres of Transparents that we had.

Q. And when did you use it on that occasion?

A. Same time, just after the king blossom we figured is set.

Q. What result did you get on thinning and mildew control, if any?

(Testimony of Cecil C. Clark.)

A. Well, we had a very good assist in the thinning; of course, on Transparents, it won't thin them completely, because they bloom over such a long period of time, but it cut our thinning bill about two-thirds.

Mr. Hawkins: May I interpose a question? What year is this? A. 1945.

Mr. Hawkins: Your Honor, I move that that testimony be stricken. It is certainly no proof that would tend to justify Dr. Regan in making his recommendations in 1945, because the results wouldn't be known until too late.

Mr. McKelvy: Those wouldn't be known, but it goes again to the question of whether Dr. Regan was out here telling somebody something that was wrong, or whether it was right.

The Court: I will overrule the objection.

Direct Examination
(Continued)

Q. Were you through?

A. No, I think I only got it half finished. I believe you asked the result in 1945, and I explained it helped in the thinning, and it also controlled the mildew, and we put it on for the double purpose that year of thinning and mildew control.

Q. Did you get good results in controlling mildew in 1945? A. Oh, yes.

Q. Did you get any damage in 1945?

A. No, I had no damage from it.

Q. Did you use the product Elgetol in 1946?

(Testimony of Cecil C. Clark.)

A. To go back to that other question now, what would you call damage?

Q. Well, any damage to your crop, and foliage burn.

A. Oh, there might be occasional leaves that would be burned a little, but it would be of no consequence, but we did kill a lot of the apples, and that's what we were after.

Q. The principal of the thinning was to stop some of the apples from pollinizing? A. Yes.

Q. That, of course, you would not call damage?

A. No, that's a benefit, of killing the blossoms.

Q. Now, getting to 1946, did you use Elgetol in 1946? A. I did.

Q. And how, and when?

A. Well, it would be just the same way, for thinning and mildew control, and applied at what we would call in full bloom, after the king bloom has pollinized.

Q. Did you get mildew control with good results? A. I did.

Q. And how about the thinning? Did you get the proper results?

A. Yes, just about the same we had all years before, two years before.

Q. How big an acreage did you spray in 1946 with Elgetol?

A. In 1946 I did not have this acre I mentioned first, but I sprayed three hundred trees.

Q. Three hundred trees?

A. Two hundred ninety-four, to be exact.

Q. Did you get any results with using Elgetol

(Testimony of Cecil C. Clark.)

so far as biennial production, or off and on years, is concerned?

A. Yes, that's one of the bad things about Transparents. They load up one year and lay off the next, and Elgetol has straightened that out, so we get a continued crop.

Q. How does it straighten them out?

A. By thinning them early, so there isn't the strain on the tree, and another thing, these Transparents are early apples, and you have to get size quick, and when we spray with this Elgetol the size develops so much faster that the crop is more valuable, because it comes on early, and in my case it's been a very, very valuable spray.

Q. You expect to use it in 1947, Mr. Clark?

A. Yes, I do. I'll not only put it on these Transparents, but on some young Jonathans that are starting to bear.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Clark, on this block of Newtowns that you sprayed in 1944——

A. Transparents.

Q. I thought you said Yellow Newtowns.

A. If I did I should have said Transparents.

Q. I'm sorry. Did you apply that in the pink?

A. No, at full bloom.

Q. And you did not apply that in the calyx either, did you?

A. No.

Q. In 1945 did you apply the Elgetol spray in the pink?

A. No, it was in the same stage.

(Testimony of Cecil C. Clark.)

Q. And did you apply it in the calyx?

A. No.

Q. In 1946 did you apply the Elgetol in the pink? A. No; full bloom again.

Q. Did you apply it in the calyx? A. No.

Q. You applied it before the calyx in all cases?

A. It would be just two or three days ahead of the calyx.

Q. Just after the king bud had set, about two days after the king bud had set, is that right?

A. Yes.

Q. And you plan to use the same program in 1947, this year? A. Yes, I do.

Q. You don't plan to make a pink spray, do you? A. No, I never have made a pink spray.

Q. And you do not plan to make a calyx spray either, do you? A. No.

Mr. Hawkins: I think that's all.

Redirect Examination

By Mr. McKelvy:

Q. Mr. Clark, so far as a spray is concerned, where it is used primarily for mildew, what is the standard time of applying it, if you know?

A. Well, depends on what you're using, and of course there are some different ideas about that, but I think lime-sulphur, you can use it at 'most any stage along, but you have to vary the strength. I've never used much lime-sulphur, so I wouldn't know about that, but with zinc coposole you put that on in the pink, I believe. I would have to

(Testimony of Cecil C. Clark.)

check up to be sure about that. It's been several years, that was before I used Elgetol, so I don't remember.

Q. Ever get any damage from lime-sulphur if the weather is wrong?

A. Well, I've seen it, but I haven't used lime-sulphur for so long that I haven't had damage.

Q. You have seen some damage with lime-sulphur?

A. I have seen trees killed with it.

Q. Here in the valley?

A. Yes.

Q. You have seen trees killed with it? That's all.

Mr. Hawkins: I have no further questions.

Mr. McKelvy: Mr. Clark I think had to go to the doctor at three o'clock, and wanted to be excused.

Mr. Hawkins: No objection.

The Court: He may be excused.

(Whereupon, there being no further questions, the witness was excused.)

EDWARD KETCHAM

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Would you give us your name, please?

A. Edward Ketcham.

(Testimony of Edward Ketcham.)

Q. And where do you live, Mr. Ketcham?

A. In Yakima.

Q. What is your business?

A. Well, for this purpose I own an orchard.

Q. For this purpose? You're an orchardist, for one thing, and what else do you do?

A. Well, I am the manager of a dehydrating plant in Selah.

Q. That's the Appella Plant?

A. Formerly; it's now the Vacu-Dry Corporation.

Q. And did you own an orchard in 1944 and 1945? A. Yes.

Q. The same orchard in those years; did you have occasion to use Elgetol on those orchards?

Mr. Hawkins: I wonder if we could find out where the orchard is, first?

Q. Tell us where the orchard is.

A. It is located on Naches Heights, about thirteen miles northwest of Yakima. I used Elgetol in 1945 and 1946.

Q. Did you use it in 1944?

A. No, I did not use it in 1944.

Q. Did you have occasion to use it for thinning, or mildew? A. I used it for mildew control.

Q. How did you happen to use Elgetol in 1945 for mildew control?

A. Well, I had a very serious mildew problem in Jonathans and also in Romes, some in Winesaps, and prior to 1944 I had tried lime and sulphur without any success, and in 1944 I started looking

(Testimony of Edward Ketcham.)

for other materials, and I think it was late in the season I began to hear the reports that some of the growers had had in mildew control, who had used Elgetol as a bloom thinner that spring, so I tried it in 1945.

Q. Did you talk with Dr. Regan before using it, or not? A. Yes.

Q. Did Dr. Regan tell you anything other than the fact——

Mr. Hawkins: Just a moment; I object to that question; it is certainly leading and improper.

Q. Well, I was just trying to get my question, to fix your objection; anything beyond what you have already testified you knew, that other growers had used it in 1944 and got good results? Now wait, don't answer it.

Mr. Hawkins: Now I object to that, your Honor.

Mr. McKelvy: Object to what?

Mr. Hawkins: Your question.

The Court: That's a question as to whether Dr. Regan told him others had used it?

Mr. McKelvy: No, whether Dr. Regan gave him any information back of 1944, which he already testified he knew from other sources, other growers had used it in 1944.

The Court: I'll overrule the objection.

A. The first discussion I had with Dr. Regan regarding Elgetol was in 1945.

Q. What did he tell you as to its use in the valley here?

(Testimony of Edward Ketcham.)

The Court: I think I'll sustain an objection to that. I can't see the materiality of something Dr. Regan said to somebody else.

Mr. McKelvy: Well, I don't know how you would prove the thing other than presumably Dr. Regan didn't go to one grower and tell him one thing and another another.

Mr. Hawkins: You can't argue that, counsel; the issue here is what, for instance, he wrote on plaintiffs' identification F, not what he told this witness.

The Court: The jury will step out just a minute. We might as well get this decided now.

(Whereupon the following proceedings were had without the presence of the jury.)

Mr. Hawkins: I made the objection; I'll state my grounds for it. It is perfectly obvious what counsel is attempting to do is to prove by all these witnesses that Dr. Regan never made any statements that this was a good mildew control, and I certainly object to any testimony along that line, and furthermore, any conversation that took place between the witness and Dr. Regan is not binding on the plaintiffs, and is entirely immaterial.

Mr. McKelvy: I'll agree with that last, that it is not binding here. We have, as I understand it, a question of whether Dr. Regan was guilty of negligence in making a statement, whether or not there was due care that he had to use in instructing the particular growers, the plaintiffs in this case.

(Testimony of Edward Ketcham.)

Now, we have contended, and the plaintiffs have testified, that they knew about it in 1944, they heard about its use in 1944 as a good mildew control incidental to the thinner. Now, I propose to show here what Dr. Regan—I won't contend everything he said would be admissible, but I contend it would be proper to show that Dr. Regan based his statement on what other growers found in 1944 by using Elgetol. That's my whole purpose; if I'm wrong, all right.

The Court: Is the way to prove that by showing what he said to other growers in 1945? What you're trying to prove by this witness is that Dr. Regan told him he knew Elgetol was all right because he knew of others using it in 1944.

Mr. McKelvy: Then you're saying the plaintiff says he said it, Dr. Regan says he didn't say it, and that ends it. You can't show what Dr. Regan said generally about it.

The Court: You're bringing the growers in to show they used it in 1944, at least one to show they used in 1944, and if Dr. Regan says he knew of that use, it seems to me that would be about the only way you can prove it. It seems to me you're getting to self-serving matter here when you show what he said to others in the year 1945, as to why he was making a particular recommendation.

Mr. Hawkins: I would like to make a further observation while the jury is out. The purpose of this testimony, according to counsel's statement, is to show that when Dr. Regan made these what

(Testimony of Edward Ketcham.)

counsel claims are alleged recommendations in 1945 to the plaintiffs, he was acting in due care because these people had tested the material on their orchard. All right, granted that he can introduce testimony of experience in 1944; does that justify the admission of experience in 1945 or 1946, or what these people will do in 1947? The test is whether or not he was exercising due care in the spring of 1945 in recommending the use of Elgetol as a mildew control. What possible bearing can the results obtained later on in 1945, 1946, and 1947 have to do with that issue?

The Court: Well, I thought of that in connection with the 1945 and 1946 testimony, but your plaintiffs have to show not only that they were directed to apply this spray in a certain way by Dr. Regan, and that they followed the directions, but that that application resulted in damage to their crop, and destroyed the crop. If somebody else used it in 1945 and 1946 and didn't destroy their crop, that may be admissible. That may be the theory.

Mr. McKelvy: We have a right to show this product isn't a thing that was a flash in the pan in 1945; it's still here with us. It goes to the question of whether Dr. Regan was negligent or not, if that's what the case is about now, if it is still here, people still using it, still like it.

Mr. Hawkins: Whether you're using it in later years doesn't prove that he was exercising due care. Let's suppose that in 1945, when he only had one

(Testimony of Edward Ketcham.)

year's experience in this valley, let's suppose he recommended its use and later on it turned out to be a perfectly good spray and nobody was hurt; still, could he claim he was exercising due care in recommending a product only tested one year, and in that year not in a scientific manner, nor in a manner he directed the application to be made?

Mr. McKelvy: Certainly; it shows later he was right.

The Court: It might depend on whether the application was made in the same way, for the same purpose, at the same time. As I understand it, plaintiffs' position is that they used it according to his direction for spray in the pink and calyx, which in the calyx particularly caused their injury. Now, if they used it in some other ways, at full bloom or when the king bud was out, that does not prove necessarily he gave them the right directions, or that he was justified in giving the right directions in 1945. I haven't yet seen any offer made in the later years that they used it in the same way.

Mr. McKelvy: I haven't got that far yet. While the jury is out I would like to get some of these questions straightened out, when plaintiff says in one breath we were negligent because we didn't test it for several years, and then says in the next breath that I can't show that it was successful enough that it is still here, for several years.

Mr. Hawkins: That would merely prove that if you recommended it in 1947 you would have a little more basis for doing so than in 1945, that's

(Testimony of Edward Ketcham.)

all. It would not prove that you were not negligent in 1945 in making such recommendation.

The Court: I think you can show the later years; I have ruled that, with a little different thought in mind. I think, though, you could show that. Certainly, if this spray had been used by growers in substantially the same way, and no damage resulted, it would be very material to the case. The thing I ruled against, though, is the growers testifying as to what Dr. Regan told them was the reason for his making the recommendation, that Dr. Regan told them that he knew that it had been used in prior years. Now, it seems to me about the only way you could show here that the use was the same or similar, sufficiently similar to have probative value, would be for these witnesses to tell what the directions were. If you're going to show what use was made, you would almost have to show under what directions it was used, if directions were given, in order to show the similarity.

Mr. Hawkins: Of course, this opens up the door for us to bring in all these people that did lose their crop in 1945, to testify they lost their crop in 1945. I'm not worried about what doors open up.

Mr. McKelvy: That's why I was trying so hard this morning to get a non-suit, because I knew what was coming.

Mr. Hawkins: If you want to go ahead that way, that's fine.

The Court: Bring in the jury.

(Testimony of Edward Ketcham.)

(Whereupon, the following proceedings were had within the presence of the jury.)

Direct Examination of Edward Ketcham
(Continued)

By Mr. McKelvy:

Q. Mr. Ketcham, I believe you said that you used Elgetol in the pink in 1945? A. No.

Q. For mildew control?

A. No. I used Elgetol in two applications in 1945; the first was in a calyx spray, and the second was in the first cover.

Q. And did Dr. Regan give you any directions in connection with the use of Elgetol that year?

A. Well, naturally, I asked him how much should be used, what strength, and he made a recommendation, and I don't recall exactly what it was, I think somewhere in the neighborhood of, oh, two-thirds of a pint to the hundred, but on that I'm not clear, but before I put on the application I was told by someone who had experience in using it that if I had a thousand gallon spray tank and used a gallon of Elgetol in a thousand gallons that I would do all right, which I did.

Q. And what results did you get from it in 1945?

A. I completely cleaned up the mildew.

Q. Did you have a bad mildew problem there at all?

A. Very bad; very bad. As I stated earlier, I had used lime and sulphur without success, in earlier years, and Zinc copsole without success.

(Testimony of Edward Ketcham.)

Q. Was the mildew in Jonathans, or different varieties?

A. It was most serious in the Jonathans, but was becoming a serious problem in Romes and also in Winesaps.

Q. Did it effect your crop at all in 1945?

A. Well, in 1941 and 1942 I had about 3600 boxes of Jonathans each year; 1944 I had 2600 boxes, of which I think 1700 boxes went to the evaporator, because of mildew damage to the apples, and in 1945, after having used Elgetol for mildew control, I had 3100 boxes, which packed out about ninety per cent fancy and better.

Q. Have you used Elgetol in 1946?

A. I used Elgetol in 1946.

Q. Do you know now whether you intend to use it in 1947, or not?

A. I'll use it in 1947.

Q. What type of crop did you have in 1946 on the trees you had used Elgetol on in 1945?

A. Well, my Jonathans jumped from 3100 to 4200 boxes in 1946, and my Romes jumped from 1300 to 3600; my Winesap production was about the same as it was in 1945; but about double what it had been in 1944.

Q. Did the Elgetol have anything to do with that?

A. Well, I think it did: or put it this way, that if I controlled the mildew using that, the freeing of buds and the terminals of the limbs, and freeing the trees from mildew infestation and helped the 1946 crop.

(Testimony of Edward Ketcham.)

Q. I believe you said something about you were at a place where you were about to treat mildew with an axe, is that right?

A. That's right.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. You did not apply Elgetol in 1944 to your orchard?

A. No.

Q. And in 1945 you did not apply a pink spray?

A. No.

Q. As I understand your testimony, you applied one-third of a pint to a hundred?

A. No, it wouldn't be that, it would be—well, you figure it out; it's a gallon to a thousand.

Q. I thought you said one-third to a hundred?

A. I said about two-thirds, was the first recommendation I heard of, and I finally ended up using about one gallon to a thousand.

Q. You started out with two-thirds to a hundred?

A. I never applied it that way.

Q. You were going to apply it that way, and then later you got word from some other grower that the proper application—

A. Well, I think that was a matter of convenience; I didn't want to measure it.

Q. But at any rate you applied one gallon to a thousand gallons of water. That would figure out

(Testimony of Edward Ketcham.)

pretty close to two-thirds of a pint to a hundred, doesn't it? That's one pint to a hundred and twenty-five gallons. A. Yes.

Q. In 1945 you applied it to your Jons alone?

A. No, I applied it to Jonathans, Winesaps, and Romes.

Q. You applied it to your entire orchard?

A. No, I didn't put any on the Delicious.

Q. I see, but to your entire orchard of Jonathans, Winesaps and Romes?

A. Yes, all of the Jonathans, all of the Winesaps, all of the Romes.

Mr. Hawkins: That's all.

Mr. McKelvy: That's all. I believe you may be excused, if there is no objection.

(Whereupon, there being no further questions, the witness was excused.)

DAVID H. SHUMAN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Will you give us your name, please?

A. David H. Shuman.

Q. And where do you live? A. In Selah.

Q. What is your occupation?

A. Fruit grower.

(Testimony of David H. Shuman.)

Q. How long have you been in the business of fruit growing? A. Oh, since about 1921.

Q. How large an orchard or orchards do you have?

A. I have twenty acres where I am.

Q. Have you ever used Elgetol in your spray program? A. I have.

Q. When did you first use it? A. 1944.

Q. And when did you use it then?

A. Well, just past full bloom; it would be almost the calyx spray. Some folks would call it calyx. My object was to kill the late blooms, primarily, to catch that late bloom. It would be really later than the—after the king bloom.

Q. How many trees or how many acres did you use it on? A. I used it on six acres.

Q. What variety?

A. Delicious, Newtons, and Winesaps.

Q. What result did you get from the application? A. I had very good results.

Q. Results in what way, now, do you mean?

A. Well, in thinning my fruit. I got it to where one son and I thinned the whole six acres in two days.

Q. Did you have any mildew problem there?

A. Not very much. There is some mildew, but it is a minor problem.

Q. Did the Elgetol help at all on the mildew?

A. Well, I thought it did.

Q. And do you remember the mixture, of how much you put on?

(Testimony of David H. Shuman.)

A. I used a gallon to the thousand gallons of water. It's easy to measure; you just dump a can in.

Q. Just dump a can in the tank? A. Yes.

Q. How did you happen to use Elgetol in '44?

A. Well, Dr. Regan said that it had been used in the east as a spray for thinning with very good success, and wanted to know if I wouldn't care to try it on a few trees, and I decided to do it all instead.

Q. Had you used it at all before the year 1944?

A. No.

Q. Did you use Elgetol in '45? A. I did.

Q. What result did you get then?

A. Very good; about the same result; very good.

Q. What mix did you use that year?

A. I used one gallon to a thousand.

Q. And when did you apply it?

A. At the same time; it was just a little bit later; it was more nearly calyx, because I wanted to be sure and catch the late bloom. It's the late bloom that really gives you your small apples. It wouldn't be a true calyx; it would be a pre-calyx.

Q. Is a late bloom and an early calyx about the same?

A. Well, that depends upon who's doing it. Some would call the calyx what I used, and some wouldn't. When I sprayed, when I hit the trees, over half, I would say, of the petals come off.

Q. And what results did you get in 1945?

A. Very good result; about the same.

(Testimony of David H. Shuman.)

Q. Did you use it in 1946? A. No.

Q. Why was that?

A. Well, the weather was rather cold at the time, and I was afraid I wouldn't get a good set of fruit, and I didn't think it was necessary. I bought the material, however, but didn't use it?

Q. Expect to use it in 1947, or not?

A. If the fruit bloom warrants it, yes.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. You did not spray in the pink in 1944?

A. No.

Q. And you did not spray in the pink in 1945?

A. No.

Q. And you did not spray in the calyx in 1944?

A. Well, that depends upon what you call the calyx. No, I wouldn't call it the calyx myself.

Q. It is not a true calyx?

A. Not what I would call a true calyx.

Q. Two or three days after the king bloom?

A. No, it was longer than that.

Q. Four or five days?

A. Yes, I would say four or five days.

Q. Petals were still on the trees?

A. They were beginning to fall, just beginning to fall.

Q. The true calyx is formed after the petals drop off, is that right?

A. My definition of a true calyx is when about fifty per cent of the petals have fallen.

(Testimony of David H. Shuman.)

Q. Well, the flesh of the apple has formed and it hasn't closed yet, is that right? A. Yes.

Q. And you sprayed before that time?

A. Yes.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all. Do you have any objection to Mr. Shuman being excused.

Mr. Hawkins: Not at all.

(Whereupon, there being no further questions, the witness was excused.)

D. W. BRACKETT

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Will you give us your name, please? Will you tell the jurors your name, please?

A. D. W. Beckett.

Q. Speak up loud enough so all the people on the far end can hear you. Where do you live at the present time, Mr. Brackett?

A. At Bellevue.

Q. Are you retired now? A. Yes.

Q. What was your occupation before you retired? A. Fruit grower.

Q. When did you retire?

A. Oh, a couple of months ago.

Testimony of D. W. Brackett.)

Q. How old are you? A. Seventy.

Q. You think you are old enough to retire?

A. I think so.

Q. How long did you work at the fruit growing business? A. About twenty-eight years.

Q. Where was your place located?

A. At Grandview.

Q. Did you sell out? A. Yes.

Q. What size an acreage did you have there?

A. Forty acres.

Q. What varieties?

A. I had Winesaps, Delicious, and a few Jonathans, and a few trees of Roman Beauties.

Mr. Hawkins: Your Honor, I would like to enter an objection at this time to the testimony of this witness. He's testified that his orchard is at Grandview. The orchards in question are up in the Tieton, out here at Gromore, up at Naches, where the weather is entirely different from what it is at Grandview. I can't see any parallel between this man's experience at Grandview and the results that may or might have been obtained up in these valleys that are higher.

Mr. McKelvy: There's no evidence here the weather is any different.

The Court: How far is that?

Mr. McKelvy: How far is it from here to your orchard?

Witness: About forty-five miles.

The Court: I'll overrule the objection; it's the same general area.

Testimony of D. W. Brackett.)

Direct Examination—Continued

Q. Did you ever use Elgetol as a spray?

A. Yes.

Q. When did you first use it? A. In '44.

Q. How did you happen to use it then?

A. Well, I had been reading a good deal in the horticultural magazines and the eastern publications, particularly, about a thinning spray.

Q. And when did you use it? A. In 1944.

Q. I mean what stage of the trees, or at what time did you use it? Do you have records here?

A. Yes.

Q. I think you showed me your records last night. You can refer to them if you want to. You've got a book in your hand; did you keep that yourself?

A. Yes.

Q. That's your own handwriting?

A. That's a farm diary, farm record.

Q. Did you write the entries in there yourself?

A. Yes.

Q. All right then, you refer to it to refresh your recollection. Now, will you tell us when you used it and for what purpose, in 1944?

A. Well, on April 25th I sprayed Jonathans with Elgetol, four cans for a sixteen hundred gallon tank.

Q. Four gallons? What size cans?

A. Gallon cans.

Q. Four gallons to sixteen hundred gallons of water, is that it?

Testimony of D. W. Brackett.)

A. Yes; well, it figured out to about one and a half per cent—no, one and a half pints per hundred.

Q. And what was the state of the trees at that time?

A. Well, I think it was a little past the critical period; in fact, I know it was.

Q. Well, was it in the pink or in the calyx or in the bloom, or what?

A. Well, it was my first experience—in fact, the Jonathan bloom comes out a good deal the same time; it's hard to hit the king bloom; and the result was it didn't do any good with the Jonathans.

Q. Did it do any harm? Did it damage the Jonathans? A. No.

Q. And you used it in bloom, then?

A. I used it in bloom, yes.

Q. Did you use it on any other varieties in '44?

A. Yes.

Q. What were they?

A. Well, let's see; I sprayed a few trees of Winesaps as a test, and we concluded it was too early, and we waited one day interval, and we sprayed the same few trees again, so they had two sprays, that is, those two or three trees had two sprays instead of one. Well, then we sprayed the balance of the orchard, about thirty-five acres, as a thinning spray. I might say my main object was to bring the orchard out of biennial bearing; the thinning was secondary consideration.

Q. What did you mean by bringing it out of biennial bearing?

Testimony of D. W. Brackett.)

A. Well, the trees would overbear one year and not enough fertility to bear the next year.

Q. How would Elgetol take care of that, prevent that?

A. Fine.

Q. How would it do it, though, prevent it?

A. Well, the first bloom in the Winesaps and Delicious, in particular, there's about six blooms of Winesaps to every cluster. Well, the center bloom is the king bloom. It comes out about twenty-four hours, sometimes a little longer on account of the weather, and if you can wait until that king bloom is pollinated, there's a very short period, well, then, when your set in the king bloom is pollinated, then spray, and it kills the pollen or the pistil or something. In the other varieties it is impossible to do a perfect job, but it reduces the drain on the fertility of the tree, and reasonably insures of having a crop every year. It's worked out so with us.

Q. Did you get any damage at all in 1944?

A. No.

Q. Did you use the Elgetol in 1945?

A. Yes—well, I would say in 1944 some of the small trees about eight or ten feet high, it took off too much bloom. The other trees were not injured.

Q. All right; now in '45 what did you do?

A. I was giving you 1945 instead of 1944, but the results were the same, practically. I might say that in—yes, in 1945, I had the wrong year, in 1945 we used two pints of Elgetol on the Jonathans

Testimony of D. W. Brackett.)

instead of a pint and a half. It didn't do any good and it didn't do any harm.

Q. I see; and when did you put it on, the two pints to the hundred?

A. I put it on on April 25, in 1945.

Q. And the trees were there when?

A. I've got a plat here somewhere. There. It was just a very little later than that period, when this king blossom was open. Now, this would open about——

Q. Later than the full pink, in other words?

A. Oh, yes.

Q. Just past the full pink? I just want to get in the record here what you're showing me. You mean it was a little later than the full pink?

A. Well, here's what they call the full pink. This king blossom would be out in a very few hours.

Q. Now, did you get any damage in 1945 at all?

A. No.

Q. Did you get results at all in 1945?

A. Yes.

Q. Did you have some trouble with mildew in the Jonathans in 1945?

A. No, we have very little mildew in the lower valley.

Q. Did you have some trees that had mildew?

A. Oh, say, I'll—let me see; yes. I'll take that back. We did have mildew late in the season in '45.

Q. Well, tell us about that. I think you told me about that yesterday. How many trees, and what happened there?

Testimony of D. W. Brackett.)

A. Well, what happened, we didn't have any crop this year, not to amount to anything.

Q. Why?

A. Well, we didn't do anything for the mildew, it was too late in the season.

Q. You mean you had mildew last year?

A. Late in the season.

Q. And did you spray for mildew at all in the spring?

A. Yes, this spring I sprayed for mildew. I didn't use Elgetol.

Q. But it didn't take care of it?

A. Well, I used sulphur. It took care of it.

Q. But did you have a crop this year?

A. No, the damage was done in 1945.

Q. Will the crop next year be affected by mildew the year before?

A. That is my experience. I've only had one year's experience with mildew in Jonathan or any other variety.

Q. Did you use the Elgetol in 1946?

A. Yes.

Q. Did you have any bad luck with it then, any damage?

A. Well, I didn't have any damage. I had bad luck; I couldn't get Elgetol in time.

Q. I see. Well, your bad luck was that you didn't get it in time, is that it? A. Yes.

Q. But you had no damage to the foliage or to the trees at all?

Testimony of D. W. Brackett.)

A. No; there's a little item here about my bad luck, if you want to hear it.

Q. Do you write it up when you have bad luck and good luck both? Let's see what it is. Well, you refresh your recollection by reading it, and then tell us what happened at that time.

A. Well, we sprayed the Delicious, and when we got ready to spray the Winesaps we found we didn't have any spray, they hadn't any at the warehouse. We wired to Yakima, or the warehouse did, and in the meantime the wind blew and we lost a day and a half, but we put on the Elgetol anyway, but it was money wasted.

Q. Put it this way; does a day and a half make a difference?

A. It was past the pollinating period.

Q. Is it of any importance, the time that the spray is put on? A. Very much so.

Q. Will a day or two difference make any difference? A. You bet.

Q. It will?

A. Yes, I would say that the critical period is, oh, not over one day, possibly less than that. Depends on the weather.

Mr. McKelvy: You may cross-examine.

The Court: The Court will recess for ten minutes.

(Short recess.)

Testimony of D. W. Brackett.)

(All parties present as before.)

(The following proceedings were had without the presence of the jury.)

The Court: Mr. McKelvy, you have called, this is the fifth witness, I believe, grower witness. How many more do you propose to call?

Mr. McKelvy: Not very many; three or four.

The Court: I think that there should be some limitation placed here that isn't unreasonable. I wouldn't want a hundred.

Mr. McKelvy: It would be possible, I can assure you, but I agree with the Court it should be limited.

The Court: I suppose you won't have more than the defendant has, if you call others on rebuttal?

Mr. Hawkins: I think not.

The Court: All right; bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

Mr. McKelvy: I wanted to ask one other question, if I might.

Direct Examination of D. W. Brackett

(Continued)

Q. Mr. Brackett, you mentioned to me in the recess that you had left some test trees during these years you have told us about, is that right?

A. Yes, what we call check trees. We leave a tree, or a half a tree, unsprayed, so we can check the results of the Elgetol spray, the thinning spray.

Testimony of D. W. Brackett.)

Q. What did you learn about Elgetol by these check trees?

A. Well, I've continued to use it.

Q. Does that mean that you got satisfactory results, is that it? A. Yes.

Mr. McKelvey: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Brackett, as I understand it, you had only one experience with mildew, is that right?

A. Yes.

Q. And what year was that in?

A. That was in '46.

Q. 1946? A. Yes.

Q. That is, your '46 crop was down?

A. No, the '45 crop. The mildew appeared late in the season.

Q. The mildew appeared late in the season in 1945?

A. Yes, and I was afraid to apply any remedies, because it was too late. The result showed up in 1946.

Q. And what mildew control did you use in 1946? A. I used lime and sulphur.

Q. Did you use Elgetol in 1946 also?

A. Yes, for——

Q. For fruit thinning?

A. Yes, for thinning.

Q. Now, the weather down at Grandview is about a week or two weeks ahead of the weather in the Yakima Valley, is it not?

Testimony of D. W. Brackett.)

A. In the upper valley, yes.

Q. And in the lower valley normally you don't have the mildew problem that you do in the upper valley, do you? A. No.

Q. That is because it is warmer and drier down there, is that right? A. That is correct.

Q. Now, as I understand it, your use of Elgetol was primarily as a thinner, is that right?

A. Well, it was primarily to bring the orchard out of biennial bearing.

Q. By cutting down the production?

A. By cutting down the setting of the fruit that would reduce the vitality of the tree.

Q. Now, you never sprayed with Elgetol in the pink stage, did you?

A. Well, there is so very little difference; yes, I have, but it is only a tree or two. It was an accident, I might say.

Q. I see; and did you spray at full bloom in these years?

A. I'm satisfied the king bloom had been pollinated by that time, the other blooms were opened, and I sprayed to kill the set, the pollinating set of the surrounding varieties. Of course, you can't do a perfect job, but you can reduce.

Q. That is, you can't cover the entire orchard in two hours, is that the point?

A. No, but it should be covered in ten or twelve, to get results.

Q. There is a very limited period?

A. There is a very limited period.

Testimony of D. W. Brackett.)

Q. And as I understand your testimony, that is directly after the king bloom has set?

A. Yes.

Q. And before the surrounding buds——

A. Have been pollinated.

Q. ——have been pollinated?

A. That's right.

Q. And that was the time you tried to hit the blooms with the Elgetol? A. Yes.

Q. Now, as I understand it, you did not spray in the so-called calyx with Elgetol?

A. No, there's no object in it.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all, Mr. Brackett.

The Court: This witness may be excused, then.

Mr. McKelvy: You may be excused, Mr. Brackett.

(Whereupon, there being no further questions, the witness was excused.)

LAWRENCE LINIGER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Give us your name, please.

A. Lawrence Liniger.

Q. That's Linniger? A. L-i-n-i-g-e-r.

(Testimony of Lawrence Liniger.)

Q. And where do you live, Mr. Liniger?

A. About nine or ten miles south of Yakima, below the gap.

Q. You're an orchardist?

A. Well, I'm running an orchard for a fruit company.

Q. And for what company?

A. Rainier Fruit Company of Yakima.

Q. And where is the orchard that you are operating for that company?

A. Well, it is about three miles west of Parker, and about nine or ten miles, I would say, pretty well south of here, on Lateral "B."

Mr. Hawkins: Your Honor, for the purpose of the record I would like to object to the testimony of this witness, for the reason he lives below the gap. The previous witness testified there was a substantial difference in weather conditions between the lower valley and the so-called upper valley where these orchards we're concerned with are located. It was testified it was drier and warmer, and they do not have the mildew problem we have in the upper valley. For that reason I think the testimony of Mr. Brackett is not pertinent, although it is in now, and I think, therefore, the testimony of Mr. Liniger is not admissible.

The Court: I'll overrule the objection. I think it goes to the weight, rather than the admissibility.

(Testimony of Lawrence Liniger.)

Direct Examination

(Continued)

Q. How large an orchard do you have?

A. Twenty-eight acres.

Q. And what varieties?

A. Jonathan, Roman Beauties, and Winesaps; a few scattered Delicious, very few.

Q. When did you first use Elgetol, if you did use it? A. In 1944.

Q. And how did you happen to use it then, Mr. Liniger?

A. Oh, I read it in the papers, and what not, it had been used for a thinning purpose more than anything, and we just experimented with a few trees scattered in the orchard, at different stage of bloom. We would hit a few trees one day, and skip a few days, and hit another few, because we weren't sure what stage it should be done at.

Q. What were you trying for, mildew or thinning?

A. We were experimenting at thinning at the time.

Q. What results did you get in 1944?

A. Well, they were—I couldn't tell you just what days it was now, but if we had checked just right on it, there might have been some tests that would be O.K. I think they would have had to have some thinning, but not as much as others.

Q. You under-thinned rather than over-thinned?

A. Oh, yes, our tests did.

(Testimony of Lawrence Liniger.)

Q. Did you have a mildew problem in 1944?

A. Yes, we have had a mildew problem, very severe, for years, I've been there eight years, on this orchard, mostly in the Jonathans, and we have used lime and sulphur in a pink spray with very little results, and after testing these few trees, both Winesaps and Jonathans, we noticed it helped cut down the mildew.

Q. That's in 1944? A. Yes.

Q. Then did you use it in 1945? A. Yes.

Q. And how did you use it then?

A. We used it in a calyx spray.

Q. What mixture did you use, do you remember?

A. A pint to the hundred, and we went over the entire orchards. I might have mentioned there was also Bartlett pears in there as fillers which had a trace of mildew at the time, and we went over the entire orchard, which took a week, or a little better, perhaps. A day or so after we finished the latter part of the orchard it rained. I could give you the date on that if I checked our books, and most generally when you finish your calyx you've got to start right over with your first cover, so we used it again at the rate of two pints to the six hundred gallon tank, which would have been a little less, I don't know how much that would amount to, but that was the way we used it, and we sprayed over half the orchard again the second time.

Q. With Elgetol?

A. Yes, in our first cover, that would be.

(Testimony of Lawrence Liniger.)

Q. What did it do, if anything, so far as controlling the mildew?

A. Well, it really did the mildew up.

Q. Did it up? A. Yes.

Q. And did you get any damage?

A. Some damage on that latter part of the orchard, I might say the west end of the orchard, which was followed by this rain, but not on the east end, and that east end also had two applications, both the calyx and the first cover, and yet there was no damage. Well, what I understand that Elgetol is supposed to do is dry up that; lime and sulphur is also supposed to dry up that mildew.

Q. Did you get as satisfactory result in 1945?

A. Well, we had a little loss, but in my own opinion, I never did ask at the plant, we know it was worth more to us than any damage it did, in my opinion.

Q. You're still working for the Rainier Fruit Company? A. Yes.

Q. Did you ever know of damage to crops or trees by using any other spray than Elgetol?

A. Well, some lime and sulphur. I've lived in the valley all my life, and I've done a lot of spraying, and I've seen some burn from lime and sulphur.

Q. You have seen some damage from lime and sulphur?

A. Well, the tree might come out of it, but I believe it would hurt them to some extent; any kind of damage will hurt a tree.

(Testimony of Lawrence Liniger.)

Q. Does the time that a spray is put on have an importance?

A. Well, most of us maybe wait too darn long on some of that stuff, and that's a lot of our trouble, and we really had a lot of mildew there, especially in the Jons, and of course it was calyx time. We thought we would use it right away.

Q. Some part of the orchard, then, you sprayed twice with Elgetol in the calyx?

A. No, the second would have been about seven or ten days after, something like that.

Q. You just kept on going, turned around, and back across the orchard again with Elgetol?

A. Yes.

Cross-Examination

By Mr. Hawkins:

Q. You did not spray in the pink with Elgetol?

A. No.

Q. Either in 1944 or in 1945? A. No.

Q. In 1944 your objective was to find out the effects of this material as a thinner, is that right?

A. That's right.

Q. And generally speaking, you tried to hit it at the full bloom stage, is that right?

A. In 1944, yes, on these different trees.

Q. Did you notice any damage as the result of that application in 1944? A. No.

Q. No burn?

A. No; we did notice mildew was dried up, which I understood it was supposed to do that, and it did.

(Testimony of Lawrence Liniger.)

Q. Did you have any blossoms drop off as a result of that application in 1944?

A. Yes, but I wouldn't say that was from Elgetol, because there's a lot of the blossoms don't pollinize which will drop off anyway.

Q. In other words, the Elgetol had no effect as a thinner, is that what you say?

A. Well, we never used it again for that purpose, but I think one of them tests would have been O.K., but you would still have to thin the tree.

Q. So you gave it up as thinner?

A. That's right.

Q. And in 1945 you used it as mildew control, is that right?

A. Yes.

Q. Have you used lime and sulphur on your orchard before?

A. Yes.

Q. And when do you apply that?

A. For what?

Q. For mildew?

A. We used that in the pink. We used that in 1943, 1944, and 1945, and also 1946.

Q. Well, then, in 1945, when you were really using Elgetol as a mildew control, you started out with a sulphur and lime application, is that right?

A. Yes; that's a very light dosage, though.

Q. Then at full bloom stage you applied the Elgetol?

A. No, it wasn't in full bloom.

Q. At what stage was it?

A. Well, I would say fifty per cent or more of the petals were off when we start our calyx spray.

Q. Well, it was between the full bloom and the calyx spray, isn't that right?

(Testimony of Lawrence Liniger.)

A. Before the—what is that, again?

Q. It was between the full bloom stage and the true calyx stage, that you applied this Elgetol?

A. No, I understand the true calyx spray is when fifty per cent of the petals are off the tree.

Q. Well, isn't the calyx the apple when it is just formed, and before the end closes up? Isn't that the calyx stage?

A. Yes; well, we try—

Q. And the blooms have dropped off at that time, haven't they?

A. No, not all of them. We try to put it on when fifty per cent of the petals have dropped off the flowers.

Q. That's what you call the calyx?

A. Yes.

Q. Now, you have testified you have seen some burn from lime and sulphur. Was that a mildew application?

A. No, mostly dormant. I never used it as a mildew, other than down there.

Q. Now, as a dormant application you use a much stronger solution than as a mildew control?

A. That's right.

Q. And in applying lime and sulphur as a mildew control have you ever observed any considerable damage?

A. No, or no good, either.

Q. In your place?

A. Yes.

Q. That's right, lime and sulphur is the standard recommendation for mildew, isn't it?

A. Well, maybe it is, but that don't mean a whole lot.

(Testimony of Lawrence Liniger.)

Q. So far as you're concerned?

A. I wouldn't waste my time on it.

Q. You wouldn't waste your time on it?

A. No.

Q. Now, isn't it generally true that down below the gap the orchards are not as much infected by mildew as they are above the gap?

A. Well, I wish you were there, any of you were there, to see that at that time. I didn't know of any as bad.

Q. In other words, your answer is that it is not true; that you have it as bad there as you do in the upper valley?

A. No, we have it just as bad, I think, at that time, in 1945, and the years before that even, when there was nothing to use for it.

Q. Well, my question is very simple. Mildew, according to your testimony, is as bad below the valley as it is in the upper valley?

A. Yes, our orchard.

Q. Then when Mr. Brackett testified a few minutes ago that there was not as much of a problem as there was in the upper valley, he was not correct?

Mr. McKelvy: Just a minute; that's not proper cross-examination.

The Court: I think that calls for a conclusion. I'll sustain that.

(Testimony of Lawrence Liniger.)

Cross-Examination
(Continued)

Q. How many orchards have you operated in the lower valley? A. That's the only one.

Q. That's the only one? A. Yes.

Redirect Examination

By Mr. McKelvy:

Q. Mr. Liniger, I'm not sure about this, but what would have happened in 1945 in your Jonathans, where you had the bad mildew, if you had not used Elgetol, in your opinion?

A. Well, it had happened in years before that, all our new growth had died back.

Q. What does that mean, to those not orchardists?

A. Well, what we're after is to build new growth in those trees, and if she dies back, you won't have any new growth. Q. Don't get a crop?

A. Not as good as on new wood.

Q. Did you clean up your mildew in 1945?

A. Absolutely.

Mr. McKelvy: That's all. Mr. Liniger may be excused?

Mr. Hawkins: No objection.

(Whereupon, there being no further questions, the witness was excused.)

A. J. BECKWITH

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Would you give us your name, please?

A. Beg pardon?

Q. Your name?

A. Beckwith, A. J. Beckwith.

Q. B-e-c-k-w-i-t-h? A. Correct.

Q. Where do you live, Mr. Beckwith?

A. In Yakima.

Q. And your business? A. Fruit shipper.

Q. And with what concern are you connected?

A. George F. Joseph and Company.

Q. Are you an orchardist?

A. I have an orchard.

Q. How much of an orchard do you have?

A. Ten acres.

Q. Of what varieties?

A. Winesaps, Yellow Newtons, and Jonathans.

Q. Have you used Elgetol in the last few years at all? A. Yes.

Q. When did you first hear about it, and how did you first hear about it?

A. Oh, I heard about it, I think, the first year it came to the valley.

Q. When was that, Mr. Beckwith?

A. I couldn't say.

Q. What year did you first use it?

A. In my own orchard?

(Testimony of A. J. Beckwith.)

Q. In your own orchard, yes.

A. Two years ago.

Q. Two years ago would be 1945?

A. No, I used it three years ago, I beg your pardon; I think it was three years ago, in the summer.

Q. That, I assume, would be 1944?

A. I think so.

Q. What did you use it for in 1944?

A. I used it to check mildew.

Q. When did you apply it?

A. It was either July or August, I do not recall.

Q. In which spray?

A. A straight spray in itself, an Elgetol spray.

Q. And do you remember what mixture you used?

A. No; it was comparatively light, though, I think.

Q. Did you get any results so far as checking mildew is concerned?

A. We think we had some results, yes.

Q. And what varieties did you use it on in that year?

A. Jonathans.

Q. Now, did you use it the following year, 1945?

A. Yes.

Q. And for what purpose?

A. For thinning Yellow Newtowns.

Q. Did you have any mildew problem with the Newtowns?

A. No.

Q. When did you apply it, so far as the Newtowns are concerned?

(Testimony of A. J. Beckwith.)

A. When the calyx had fallen, approximately half fallen—when the petals had approximately half fallen.

Q. When the petals had approximately half fallen, and you applied it at that time for the purpose of thinning? A. Yes.

Q. Did you get any injury to the foliage of the trees, or any injury of any kind?

A. It seems that we observed where there was an occasional mildew shoot, mildew covered terminal, it burned that, but we had no damage, no commercial damage.

Q. What kind of results did you get so far as thinning was concerned.

A. We were very well pleased with it.

Q. Did you use it in '46, by the way?

A. Yes.

Q. On the Jonathans, or what variety?

A. No, on the Yellow Newtowns.

Q. Did you use it on anything except the Newtowns in 1945? A. No.

Cross-Examination

By Mr. Hawkins:

Q. In your Yellow Newtowns do you have a mildew problem? A. No.

Q. It is not serious. Do you have a mildew problem in your Jons?

A. Not now; there is always, in my orchard, at least, there is always a mildew problem.

Q. What do you use ordinarily, lime and sulphur?

(Testimony of A. J. Beckwith.)

A. Sulphus, both lime and sulphur and emulsified sulphur.

Mr. Hawkins: That's all.

Mr. McKelvy: That's all.

(Whereupon, there being no further question, the witness was excused.)

A. C. KNUEPPEL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Your name is Gus Knueppel?

A. August Kneuppel.

Q. And where do you live, Mr. Kneuppel?

A. I live in Ellensburg.

Q. What's your business? A. I'm retired.

Q. And what work did you follow before you retired? A. With an orchard.

Q. When did you retire?

A. In '46, a year ago.

Q. Did you raise an orchard crop in '46?

A. No.

Q. '45 was the last year you worked on the place? A. Yes.

Q. Where is your place, Mr. Knueppel?

A. Where I'm living now?

Q. No, your orchard you had in '45?

(Testimony of A. C. Knueppel.)

A. About—well, it's on Route 2, near Thrall.

Q. That's what, east?

A. About three miles east of Thrall.

Q. And so far as Ellensburg is concerned, is it east of Ellensburg?

A. Well, it's about—I think it's southeast.

Q. About how far, would you say, from Ellensburg?

A. Eight miles.

Q. How much of an orchard did you have there?

A. Thirty acres.

Q. What varieties, sir?

A. McIntosh, Jonathans, Winesaps, Romes, Newtowns.

Q. How many years did you follow the business of an orchardist?

A. Twenty-three years.

Q. Twenty-three; did you have occasion to use Elgetol during the time you were operating this orchard?

A. Yes.

Mr. Hawkins: I would like to enter an objection, for the purpose of the record. That testimony shows that this man's orchard is in Ellensburg, a considerable distance from Yakima. There is no showing that the conditions that obtain on Mr. Knueppel's orchard are anything like the conditions obtaining on the plaintiff's orchards, and therefore we object to the testimony as being immaterial.

The Court: About how far is this from Yakima? Of course, I know, but the record doesn't show.

A. Thirty miles.

The Court: I think, however, there is an important difference here, that is, apart from the distance.

(Testimony of A. C. Knueppel.)

I think it will be conceded by both counsel that Ellensburg is not in the Yakima valley district, and is not so considered, and it seems to me we must draw the line someplace. We don't want to go to Wenatchee, Spokane, Hood River, and bring in all these orchardists who have used Elgetol with good or bad results. I am going to sustain the objection, and limit the testimony to growers in the Yakima valley area.

Mr. McKelvy: Well, of course, this is only thirty miles, your Honor, and I don't want to argue with your Honor's ruling, but I do want to make an offer of proof of what Mr. Knueppel would testify. Merely because we have some hills or canyons, there may be some difference, but I think it goes to the weight rather than the admissibility. I may say this is the last witness. I don't intend to call anybody from Hood River, or Spokane, or overburden the Court.

The Court: Well, the jury may withdraw for the offer of proof.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: If I let you go to Ellensburg then the plaintiffs will go to Ellensburg.

Mr. McKelvy: That would be all right with me.

The Court: It wouldn't with me, though. I don't want to run this trial indefinitely.

Mr. McKelvy: Well, the Court has indicated we should limit the witnesses, which we have; this

(Testimony of A. C. Knueppel.)

is our last witness. This witness happens to have used this product right through, and you correct me, Mr. Knueppel, if I'm wrong in anything I say here, right through from the pink into and through the calyx, is that right, sir?

Witness: Yes.

Mr. McKelvy: And I therefore think, that's why we selected him, because counsel has been pointing at the fact that some witnesses here haven't used it at different times. Now, true, it's thirty miles away, and I suppose it could be argued there is some difference in the weather, I don't know, but still, in view of the position that counsel has taken that some of these witnesses haven't used it in various stages, I think that we're entitled to show what this man did. It goes to our good faith. It shows what results he had in 1944. It goes to actual information we had when these people in this case talked with Regan in 1945. Now, if your Honor feels that, I want to ask questions here, and make the offer of proof. Here we have a witness that used it in the pink, and of course that's really why the objection is made, not the thirty miles.

The Court: Well, it would be cumulative, even as to that. We've had testimony that they applied it in the pink and in what they call the calyx stage, so that it is cumulative.

Mr. McKelvy: Very little cumulative, as I recall. I think you will hear counsel argue there has been only one or possibly two witnesses who testified to that. Also there is a claim by the plaintiffs that

(Tetimony of A. C. Knueppel.)

weather doesn't affect it, and it is brought out by the plaintiffs that they did not have any knowledge whether weather affected it, so it wouldn't make any difference at that time whether it was thirty miles up the canyon or forty miles down south.

Direct Examination

(Continued)

(Offer of Proof in the Absence of the Jury.)

Q. Mr. Knueppel, when did you first use Elgetol? A. In 1944.

Q. How did you happen to use it?

A. I wanted to cut down my thinning bill, and get the thinning over with.

Q. And did you talk with Dr. Regan at that time? A. No, I didn't.

Q. Did you ever talk with Dr. Regan about the use of this product?

A. Not that I know of.

Q. When did you apply it in 1944, that is, what stage of the trees?

A. Well, I started in the pink, late pink, and I finished up, petals were off I should say about eighty per cent; not ninety per cent.

Q. Eighty or ninety per cent off? A. Off.

Q. In other words, you kept going between those two times, is that right?

A. Yes, I kept going.

Q. Spraying from the pink to the calyx; did you have any damage in 1944? A. No.

(Tetimony of A. C. Knueppel.)

Q. Did you use the product on the Jonathans in 1944? A. Yes.

Q. What other varieties did you use it on?

A. On McIntosh, Jonathans, Romes, and Newtowns, and——

Q. Now, how about 1945; did you use it in that year?

A. I used it in the same varieties.

Q. Same varieties in 1945 as 1944?

A. Yes.

Q. And when did you apply it in 1945?

A. In 1945 I applied it at the same time; like I says, it was in the pink.

Q. In the pink? A. Yes.

Q. And then kept——

A. Kept right on going until—the petals hung on in 1945 longer than they did in 1944, on account of weather conditions.

Q. Did you spray in the calyx in 1945?

A. In 1945?

Q. Did you spray in the calyx in 1945?

A. Uh huh.

Mr. McKelvy: Substantially, that's our offer, your Honor. I believe in the issues as they're framing up here that we're entitled to put that testimony in.

The Court: I don't care for argument; I just want to know if you still object.

Mr. Hawkins: Yes, I still object.

(Tetimony of A. C. Knueppel.)

Mr. McKelvy: One other question; did you get any injury, any damage of any kind in either 1945 or 1944?

A. No, I didn't.

The Court: The court is still of the opinion that this type of testimony should be limited to the Yakima valley area, and if we go to Ellensburg, it seems to me we shouldn't limit any testimony from areas just as similar. It seems to be Wenatchee is as close in some respects as Ellensburg. Sustain the objection.

Mr. McKelvy: I have not asked, because of the Court's ruling, various questions of these witnesses as to what Dr. Regan told them, but I want the record clear. As I understood it, the court ruled I could not ask that of these growers. Is that correct?

The Court: Not entirely. As I recall the way the question came up, the question was designed to bring out from the grower witness what Dr. Regan had told him as to why Dr. Regan was recommending this product, which was because Dr. Regan knew that somebody had used it in 1944 and told him it was all right. I would say you would be permitted to give testimony as to directions that were given, if any, by Dr. Regan, in order to show the manner in which it was applied, whether it was or was not in accord with the other.

Mr. McKelvy: I think we're together on it. The Court ruled we could ask what directions, that is, how much to use, but not what he said as to the past useage of the product itself.

(Tetimony of A. C. Knueppel.)

The Court: Yes, that's right.

Mr. McKelvy: All right, Mr. Knueppel, you can step down. I would like an exception to your ruling.

The Court: Yes, of course.

(Whereupon, the following proceedings were had within the presence of the jury.)

Mr. McKelvy: I assume that it is in order for us to tell the jury the court ruled that Mr. Kneup-pel couldn't testify?

The Court: Yes, of course.

Mr. McKelvy: So we had him testify in the absence of the jury, because he was from Ellensburg.

The Court: Yes, that's right.

Mr. McKelvy: With that, the defendant rests.

Mr. Hawkins: At this time the plaintiffs by way of rebuttal will call Mr. Crews.

ROBERT W. CREWS

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please, sir?

A. Robert W. Crews.

Q. And where do you live?

A. Route 1, Tieton.

Q. Is your orchard near the orchard of Mr. Emerson?
A. Just one mile straight east.

(Testimony of Robert W. Crews.)

Q. And how many acres do you have in that orchard? A. Twenty acres.

Q. Twenty acres?

A. Twenty acres of apples and pears.

Q. Of apples and pears? A. Yes, sir.

Q. Do you have any Jonathans?

A. Yes, sir.

Q. Do you have a mildew problem on your orchard, Mr. Crews? A. Yes, sir.

Q. Are you familiar with the product known as Elgetol? A. Yes, sir.

Q. Have you ever used that product?

A. Yes, sir.

Q. In what year did you use it?

A. Year of '45.

Q. In 1945; and in what way did you use the spray?

A. We used that in the pink, as a supposed control for mildew.

Q. You used it as a mildew control?

A. Yes, sir.

Q. And you sprayed in the pink?

A. Yes, sir.

Q. Did you make a second application?

Mr. McKelvy: I object to this, so we have the record straight, as not rebuttal testimony.

The Court: It will be overruled; proceed.

Direct Examination

(Continued)

Q. Did you make a second application of Elgetol, Mr. Crews? A. Partly.

(Testimony of Robert W. Crews.)

Q. And at what stage did you make that second application? A. An early calyx.

Q. And how much of your orchard did you cover with this second application?

A. I would say about ten per cent of the Jonathans and Romes, only.

Q. What result did you observe as a result of the use of Elgetol?

Mr. McKelvy: Object to the question as leading and suggestive, and assuming.

The Court: Well, what result—I'll overrule the objection. You can tell what you observed afterward.

A. We saw after we had started with the second time over that the leaves just began, or the buds of the petals started to turn brown, and it looked just as though a heavy frost, like they were frosted, and they fell off.

Q. Did you sustain any damage or loss of crop that year, 1945?

Mr. McKelvy: Object to that as not rebuttal testimony, and further, calling for speculative testimony at this time; part of the case in chief.

The Court: I'll sustain the objection, if it pertains to the amount of money damage. I think he can describe what happened to his orchard, if anything, as the result of the application of the spray.

Direct Examination

(Continued)

Q. What happened to your crop as the result of the application of the Elgetol spray?

(Testimony of Robert W. Crews.)

A. It was a loss.

Q. What strength did you apply the Elgetol?

A. The first time, one and a half pints per one hundred gallons of water, and the second time, one pint.

Q. And just for the purpose of the record, you have filed a claim with the defendant, have you?

A. That's right.

Mr. Hawkins: That's all.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Crews, what variety did you use it on?

A. Jonathans and Romes.

Q. How many of them did you spray in the so-called calyx?

A. Oh, I would say it was probably one hundred trees of each variety; no, there wasn't that many; there wasn't over seventy or seventy-five, maybe; not very many.

Q. A total of seventy-five in the calyx?

A. That's right.

Q. Got damage from those you sprayed in the calyx, too? A. How's that?

Q. Did you get some burn from the trees that you sprayed in the calyx twice? A. Yes.

Q. Did you have any trouble from the trees you sprayed only in the pink? A. Yes, sir.

Q. You had trouble from both of them?

A. Yes, sir.

(Testimony of Robert W. Crews.)

Q. Why did you stop spraying in the calyx?

A. Why did we stop?

Q. Yes.

A. Because I come back to Dr. Regan, or the spray company, to find out what the difficulty was, and they come up and said——

Q. Had you had difficulty?

Mr. Hawkins: Let the witness answer the question.

Mr. McKelvy: No, I'm not going to spread the issues.

The Court: We'll let it stand as it is; go ahead.

Cross-Examination

(Continued)

Q. My question is, what happened in the orchard? That's the question.

A. Well, it burned it, and we come back to the spray company to find out what the difficulty was, and they come up and said, "Don't put it on, it's too late."

Q. When did you first see the burn?

A. We saw the burn at the time we started to spray the calyx, but we didn't know that was what the difficulty was; we naturally assumed that Dr. Regan and the company knew what they were about.

The Court: Just answer the questions. He'll ask you plenty of questions.

Q. Did the trees that were sprayed only in the pink show any different effect than the ones that were sprayed both in the pink and in the calyx?

(Testimony of Robert W. Crews.)

A. The ones in the pink, did they show any different?

Q. Yes, was there more, or the same amount of injury, to the ones just sprayed in the pink?

A. No, the total damage seemed to be about the same.

Q. The tree that you sprayed in the calyx and the pink was just the same as the one in the pink?

A. Yes, it seems that the damage had been done prior to the calyx.

Q. Just answer the questions. You think it was done prior to the calyx? A. Yes.

Q. Did you have mildew on the Jonathans?

A. Yes, sir.

Q. Bad mildew? A. Yes.

Q. Didn't have much of a bud set, did you, on the Jonathans?

A. A bud set? Yes, it was pretty good, but the bloom after it was sprayed was different.

Q. You didn't expect much of a crop, did you?

A. Yes.

Q. On the Jonathans? A. Yes.

Q. Did it control the mildew that year, 1945?

A. No.

Q. Was it cleared up some for '46?

A. In '46?

Q. Was it better, the mildew condition better in 1946 than it was in 1945?

A. Oh, yes, we sprayed with early lime-sulphur.

Q. But it was better in 1946 than in 1945, is that right? A. Yes, sir.

(Testimony of Robert W. Crews.)

Q. How long have you been operating an orchard? A. Been operating an orchard?

Q. Yes.

A. Ever since there's been orchards in Tieton; we been there forty-six years.

Q. I suppose you know, then, that some burn and some injury occurs in 'most any spray under certain conditions?

A. I wouldn't say from 'most any spray.

Q. Well, you've heard of some injury being sustained because of using other things than Elgetol?

A. Yes.

Q. You have had some injury by using other sprays than Elgetol? A. How's that.

Q. You on your orchard have had some unsatisfactory results with other sprays than Elgetol, haven't you? A. Yes.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all, Mr. Crews. May Mr. Crews be excused at this time?

The Court: Yes, he may be excused now.

(Whereupon, there being no further questions, the witness was excused.)

H. S. RADEMACHER

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. H. S. Rademacher.

Mr. McKelvy: What's the name? I didn't get it.

A. R-a-d-e-m-a-c-h-e-r.

Q. And where do you live, Mr. Rademacher?

A. Tieton, Washington.

Q. What is your business, sir?

A. I didn't hear you.

Q. I say, what is your business?

A. I am an apple grower.

Q. You have an orchard, do you?

A. Yes.

Q. And where is it located?

A. A mile and a half northwest of Tieton City; and one in Gromore.

Q. And how long have you been engaged in the orchard business?

A. Well, I spent two years in Wenatchee, and the last twenty-six years in Tieton.

Q. You have apples in your orchard?

A. Yes.

Q. What kind of apples do you have?

A. Jonathans, Delicious, and Winesaps.

Q. And do you have a mildew problem in your orchard? A. Yes.

(Testimony of H. S. Rademacher.)

Q. What do you ordinarily use to control that mildew? A. Sulphur.

Q. When applied?

A. I usually apply a pink spray, followed with a calyx spray.

Q. When did you first hear of Elgetol?

A. 1944.

Q. And where did you get the idea of using Elgetol?

A. From the Ortho News bulletin.

Q. As a mildew control? A. Pardon?

Q. As a mildew control? A. Yes.

Q. When did you apply Elgetol as a mildew control?

A. Why, I applied it following the time for calyx. It was after the calyx time. I had some additional work forced on me in Gromore at that time, and I didn't get the calyx on, so I had to apply this spray following the usual calyx time.

Q. About how many days after the calyx?

A. I would say a week, from a week to ten days after the usual calyx time.

Q. And what was the strength in which you applied the Elgetol?

A. It was the recommended strength.

Mr. McKelvy: I move that the answer be stricken as not responsive.

The Court: It will be stricken, and the jury will disregard it.

Q. How many pints per gallon or per hundred gallons did you use? A. A pint.

(Testimony of H. S. Rademacher.)

Q. One pint?

A. Yes, that's what I started out with.

Q. And what results did you obtain from this spray?

A. Well, I noticed, I think we sprayed one day, and then we were blown out for two days, and when we got back I noticed that the leaves showed a burned ring around the outside of the leaf, and so I dropped the doseage to about two-thirds of a pint, and I continued spraying twenty acres that way over the next four or five days.

Q. And what results did you observe from that application?

A. I lessened the burning. There was burning at different parts of the orchard. I was running six guns, and the results on each one of the spray men was the same.

Q. And what were those results?

A. What was the results?

Q. Yes.

A. There was a lessened burning. Later on when we come back for the next spray, different parts of the orchard I had a drop.

Q. You had a what?

A. A fruit drop; the apples had begun to loosen up at that time, and we could blow them off readily with the pressure of the gun.

Q. And what, in your opinion, caused the apples to loosen up?

A. Well, I was of the opinion it was the burning effect of the Elgetol that loosened the apples.

(Testimony of H. S. Rademacher.)

Q. Did you notice any burn or discoloration on the stems of the apples?

A. When an apple drops, when something affects the apples so that they drop, the stem turns a pale color, or a yellow color, and the apples that are going to stay on seem to grow away from it, and it's very noticeable. You can just sense it, that something's wrong with those apples, and the least little touch on them and they fall off.

Q. Did you use Elgetol in 1945? A. No.

Q. Did you ever advise Dr. Regan of your result in 1944?

Mr. McKelvy: Object to it as not rebuttal testimony.

The Court: Well, I'll overrule it.

A. I never consulted Dr. Regan on the use of Elgetol, or I don't remember of discussing my spray troubles with him regarding Elgetol.

Mr. Hawkins: I think that's all.

The Court: The court will recess now until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock p.m.)

(Testimony of H. S. Rademacher.)

Yakima, Washington, January 29, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Cross-Examination of H. S. Rademacher

By Mr. McKelvy:

Q. Mr. Rademacher, I understand that you put the Elgetol on in '44; am I right in that?

A. Yes.

Q. And you started applying it for mildew about a week to ten days after the calyx period had elapsed, is that correct? A. Yes.

Q. You've been running orchards, I suppose, for a good many years? You've been an orchardist for a good many years, have you?

A. Yes, quite a few years.

Q. How long have you been in the orchard business? A. Twenty-eight years.

Q. Forty-eight? A. Twenty-eight.

Q. Twenty-eight; I didn't mean to get you any older than you are. I suppose, then, you know when the so-called standard time for applying mildew sprays is; is that in the pink and the calyx?

A. Yes, it is.

Q. In the pink and the calyx, but by your own experience and your own judgment you decided to try it after the calyx in this particular case?

A. The wind had blown and I was delayed with other work, so I had no other thing to do but try to check it; that time was past, the best time was past, and it was still going, so I had to apply it when I could.

(Testimony of H. S. Rademacher.)

Q. I take it you hadn't been satisfied with mildew control with other sprays, is that right?

A. Yes, I had always been satisfied with sulphur.

Q. And had you ever gotten any damage from any other sprays than Elgetol, in your experience?

A. Not from mildew; I have had oil damage in the dormant spray.

Q. And that was using an oil dormant, I take it?

A. Yes.

Q. Did you talk with Mr. Emerson or Mr. Stahler or Mr. Keck in 1944 about orchard business?

A. No.

Q. Have you talked with them at all about it?

A. I met Mr. Emerson two or three times.

Q. When, first?

A. Oh, I think last summer sometime.

Q. That is, in the summer of '46, you mean?

A. Yes, last year some time, when his trial was coming up.

Mr. McKelvy: That's all. Thank you, sir.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.)

FRED C. MEYERS

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please, sir?

A. Fred C. Meyers.

Q. Fred C. Meyers? A. Yes, sir.

Q. And where do you live, sir?

A. Five miles west of Yakima, on Tieton drive.

Q. And what is your occupation?

A. Fruit grower.

Q. Do you have an orchard out there five miles west of Yakima? A. Yes, sir.

Q. And what do you have on the orchard?

A. Well, we have Saps, and Delicious, Jonathans, and Romes.

Q. And do you have a mildew problem in your orchard? A. Yes, sir.

Q. And do you ordinarily spray that with lime and sulphur? A. Yes, sir.

Q. Have you ever used Elgetol as a mildew control? A. Yes, sir.

Q. In what year? A. In '45.

Q. The year of 1945? A. Yes, sir.

Q. How many applications of Elgetol did you make that year? A. One.

Q. And at what stage of the bloom did you make it?

A. Well, I would say it was late calyx.

Q. Late calyx? All the petals had fallen off the tree? A. Yes.

(Testimony of Fred C. Meyers.)

Q. And what strength did you use?

A. I think if I remember right it's a pint and a half; it was what they recommended, anyway.

Q. Pint and a half to the what?

A. To the hundred.

Q. One hundred gallons of water?

A. Yes.

Q. And what effects did you observe after the application of Elgetol?

A. Well, I didn't get quite the ten acres all sprayed, I had about a half a day left, and the wind came up, and that delayed us two days, and in that time I seen I was getting an awful lot of injury, so we stopped right there.

Q. And what do you mean by injury?

A. Well, the leaves just curled like you had hit them with a blow torch.

Q. Did you have a crop that year on that part of the orchard you sprayed?

A. That was my big year for Jons.

Q. Did you get a good crop that year on the part of the crop you sprayed with Elgetol?

A. I didn't get any apples where I sprayed with Elgetol.

Q. And that part of the orchard that you did not spray with Elgetol, what crop did you get?

A. I had a good crop; same as it should be.

Cross-Examination

By Mr. McKelvy:

Q. Did you spray all of your Jonathans?

A. Absolutely.

(Testimony of Fred C. Meyers.)

Q. Did you spray any other variety?

A. I sprayed, there was a small block of Delicious, and practically the whole block of Romes, and all of the Saps except a few Saps up by the building where we hadn't finished.

Q. Did you have any mildew problem on Delicious? A. Yes.

Q. How about Winesaps?

A. Winesaps, I have it in them too; not much, but I can find it, and the same in the Romes, and plenty in the Jons.

Q. Your big trouble was mildew in the Jons, is that right? A. It's in everything.

Q. More in the Jons?

A. Yes, but then I sprayed it all.

Q. Which did you spray first?

A. Well, we generally start on the back, and on two lines, and spray straight through, and they both got in at the same time; it's a long narrow ten, and they go straight through.

Q. Jonathans was the only one where you had a drop, is that it? A. Absolutely not.

Q. Where did you have a drop?

A. I had drop on Romes and Saps and no Delicious at all.

Q. You used it in the calyx, or after the calyx?

A. It was a delayed calyx, is what it was.

Q. Delayed calyx?

A. You'd call it a delayed calyx.

Q. Well, how much delay? How long after the calyx?

(Testimony of Fred C. Meyers.)

A. Well, your petals have all dropped, and it will be a delayed calyx.

Q. Did you use it at all in '44?

A. No, sir.

Q. Did you use it as a thinner in '45?

A. No, sir.

Q. You first heard of Elgetol, I take it, in '45?

A. '45 is when I heard they were using it, so I looked into it; to see whether it was all right, and I asked different growers that had used it. One of them was Walt Gray, on Congdon Orchard, and at the warehouse they told me some of the growers on Swede Hill was using it, and they looked it up and found they had good luck the year before, and I bought it at the Farmers Supply, and asked them how much they would recommend putting on, and they called up somebody, now I don't know who they called up, and they said, if I remember right, it was a pint and a half, I won't say for sure.

Q. By inquiring about the growers you learned that they did get a good mildew control in 1944 incidental to thinning operations?

A. Well, they said they didn't get hurt. I don't know how much of a mildew kill they got.

Q. You knew that 1944 was the first year it had been used by any of the growers here in the valley, did you?

A. Yes.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.)

OTTO JONES

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. Otto Jones.

Q. Where do you live, Mr. Jones?

A. I live a mile and a half south of Gromore.

Mr. McKelvy: South of where?

A. One mile and a half south of Gromore.

Q. Oh, Gromore? A. Yes.

Q. And that's here in the Yakima valley?

A. Yes, it is.

Q. What is your occupation, sir?

A. I am a fruit grower.

Q. And how long have you been engaged in that line?

A. I've taken three crops off the place.

Q. And do you have an orchard at the present time? A. Yes, sir.

Q. And how long have you had that orchard?

A. Three years.

Q. Do you have a mildew problem on your orchard?

Q. What varieties do you have in your orchard?

A. I've got Jonathans and Winesaps.

Q. Just those two varieties? A. Yes, sir.

Q. And you have a mildew problem in both of those varieties? A. Yes, sir, I do.

Q. Have you ever used Elgetol to help you in your mildew problem? A. Yes, sir, I have.

(Testimony of Otto Jones.)

Q. In what year did you use Elgetol?

A. In 1945.

Q. What strength Elgetol did you use?

A. I used one pint to the one hundred gallons of water in the pink spray, and I used one-half pint to the hundred gallons of water in the calyx spray.

Q. You applied the Elgetol twice, then?

A. Yes, sir.

Q. Once in the pink, and once in the calyx?

A. That's right.

Q. And what effect did Elgetol have upon your orchard?

A. Well, it burned my leaves, burned the apples until they dropped off the blossom, the buds, burned some of the buds until they didn't even open after they was in the pink.

Q. And did you have a good crop that year, in '45?

A. No, sir I didn't. I got four thousand boxes off of seventeen acres of solid Jons.

Q. And in your opinion that was caused by the use of Elgetoll?

A. I'm positive it was the cause.

Q. I didn't hear you?

A. I'm positive that was the cause. It couldn't have been anything else, only the Elgetol.

(Testimony of Otto Jones.)

Cross-Examination

By Mr. McKelvy:

Q. What did you use for mildew in the Jons in 1944?

A. I used lime-sulphur.

Q. And was there any particular reason to change from lime-sulphur to Elgetol in '45?

A. So I could get in quicker with oil; I had a codling moth problem.

Q. You had learned that some growers had used the product in the valley in 1944?

A. I had heard that, yes.

Q. And you knew that they had used it as a thinner, and found that incidental to thinning, it was a good mildew control?

A. I had heard that they had used it as a thinner, and was getting mildew control out of it.

Q. The standard time or recommendation for applying a spray for mildew is in the pink and in the calyx, is that right? A. Yes, sir.

Q. And you applied it in those two times?

A. Yes, sir.

Q. Now, did you know any neighbors or other growers who had a small crop of Jonathans in 1945, that did not use Elgetol?

A. That had a small crop?

Q. Yes.

A. Not in the locality where I live, no.

Q. Matter of fact, there were quite a few; it was rather prevalant that Jonathans were pretty slack

(Testimony of Otto Jones.)

in 1945 if they weren't treated for mildew, is that right?

A. No, all the Jonathans was good on this hill where I live in 1945.

Q. Did you have quite a bit of mildew in your Jonathans?

A. I had quite a bit, yes.

Q. Enough that the mildew would have affected the crop, isn't that right?

A. It might have; I might have got some culls out of it if I hadn't used some kind of mildew control.

Q. Did you get a good crop of Jons in 1946?

A. Fairly good.

Q. How many boxes did you get off of them?

A. I got eight thousand, a little better than eight thousand—pardon me, in what year?

Q. 1946.

A. I got a little better than eight thousand boxes.

Q. That was a pretty good crop?

A. Fairly good. I got a little over nine thousand in 1944.

Q. That was the first year you farmed up there?

A. It is, yes.

Q. Do you still have mildew trouble in your Jonathans?

A. Yes, sir, I do.

Q. And it's quite a problem, isn't it, the Jons?

A. Well, I'd sooner not have it.

Q. Did you use Elgetol at any time in '46?

A. In '46?

(Testimony of Otto Jones.)

Q. Yes.

A. No, I didn't use any Elgetol in '46.

Q. Did you ever get burned, get some injury, by using other sprays than Elgetol?

A. No, sir, I haven't.

Q. How long have you been in the orchard business?

A. Well, I've only owned an orchard just three years. I have sprayed, though, the past five or six years, worked in orchards.

Q. Did you first notice your trouble in this particular year after the pink spray?

A. Yes, I noticed some of the trouble.

Q. You what?

A. I noticed that they was burned some after the pink spray.

Q. But then you went ahead and covered all of it with calyx?

A. Yes; I really didn't believe they was burned bad enough to quit on it after the pink spray, and I knowed neighbors that was going ahead that I figured had more burn than I had.

Q. With Elgetol?

A. They was burned with Elgetol.

Q. You did not stop with calyx; you covered all the calyx, all the Jonathans? How about the Saps?

A. I just started in the Saps, and just sprayed part of one line, is all I sprayed.

Q. Did it make any difference in the Saps, the ones you sprayed with calyx and the ones you didn't?

(Testimony of Otto Jones.)

A. Well, the ones that I sprayed had less than half a crop. They had quite a few apples on them, but less than half a crop. Where I had perfect bloom, where there was good crop, where I did not spray.

Q. You mean both sprays?

A. No, I didn't spray the Saps in both sprays; that was in the calyx.

Q. You didn't put a pink on the Saps at all?

A.. No.

Q. What stage of the calyx were they in?

A. Well, they was about, I'd say sixty or seventy-five per cent of the blossoms that had dropped off.

Q. Did it do a thinning job, too?

A. Well, it thinned those, all right; thinned plenty of them off.

Q. Did you have in mind a thinner?

A. No, sir.

Q. You knew it had been used as a thinner?

A. I knew it had been used as a thinner, but I wasn't intending to thin with it. The way I got it, on thinning, when the king blossom had dropped off, that was the time to thin, and I thought this was later than that stage.

Q. You knew how it thinned?

A. I had heard, yes; I never thinned that way.

Q. But you knew the principle of the thinning, it had to kill some of these buds? A. No.

Q. Did the trees that had the most mildew get the most damage?

(Testimony of Otto Jones.)

A. No, the most vigorous trees I had on the place was the ones that got hurt worst. It was in a low place, what I put it, two rows; more moisture in this low place. There was the most healthy Jonathans I had on the place, and it burned them so much it really injured the trees.

Q. The tree was damaged?

A. Yes, the trees was damaged, and it didn't get any leaf on them the whole summer.

Mr. McKelvy: That's all.

Redirect-Examination

By Mr. Hawkins:

Q. In your experience in spraying apple trees for mildew with lime and sulphur, have you ever experienced a burn like you did that year in 1945 with Elgetol?

A. I never have.

Mr. Hawkins: That's all. May Mr. Jones be excused?

Mr. McKelvy: No objection.

(Whereupon, there being no further questions, the witness was excused.)

MILES GIBSON

called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. Miles Gibson.

Q. Where do you live, Mr. Gibson?

A. Three miles west of Selah.

Q. What business are you in?

A. Orchardist.

Q. Do you have an orchard out near Selah?

A. Yes.

Q. How many acres do you have there?

A. Twenty.

Q. Twenty? A. Twenty.

Q. And what is that acreage planted to?

A. Mostly apples.

Q. What varieties?

A. Well, there's Winesaps, Jonathans, Delicious Staymens, and a few Arkansas Black.

Q. Do you have a mildew problem in your orchard? A. I do in the Jonathans.

Q. Did you ever use Elgetol, Mr. Gibson?

A. I did.

Q. What year? A. '46.

Q. '46? A. '45; excuse me.

Q. 1945. What strength Elgetol did you use in 1945?

A. Well, on the pink I used a gallon and a half to a thousand gallons of water.

Q. And what did you use in the calyx?

A. I used one gallon.

(Testimony of Miles Gibson.)

Q. You applied two Elgetol sprays to your Jonathans, did you? A. Yes.

Q. And what was the effect of Elgetol on your orchard? A. It destroyed the crop.

Q. Did it do anything to the leaves of the trees?

A. It burned most of the foliage.

Q. I believe you also have a suit pending against the California Spray-Chemical Corporation, isn't that right? A. I do.

Mr. Hawkins: I think that's all. You may cross-examine.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Gibson, as I recall it, as you testified in your case, you used this product in the full bloom, didn't you, just after the petals had started to fall?

A. I first applied Elgetol after ninety per cent of the petals were fallen, when you gently shake the branch and most of the petals would fall off.

Q. That's when you applied it so far as the calyx is concerned?

A. That's when I first applied it.

Q. Oh, first applied it; didn't you use it in the pink? A. No.

Q. Let's see——

A. Well, that's what I call my pink spray, but when I come to put it on the pink, the water was off, then the water come back on, the full bloom stage was on, and I waited until after then to apply it.

Q. Now, let's get this straight.

A. You hashed that all over in the other trial.

(Testimony of Miles Gibson.)

Q. Pardon?

A. You hashed that all over in the other trial.

Q. I know we did, but this jury didn't hear it.

A. What?

Q. But this jury didn't hear it; in the other trial, you say, the other jury did. What did you call your pink, now; when did you apply what you call your pink spray?

A. After full bloom stage, which is not a true pink spray.

Q. Yes; then that was Jonathans? A. Yes.

Q. And when did you apply what you call the calyx? A. Ten days later.

Q. And at that time the petals were pretty well gone, I guess? A. They were.

Q. Were gone. I take it you went over once and then just about started over again.

A. That's about right.

Q. Close together?

A. The first tree that I had started in first was hit ten days later with the next spray.

Q. What kind of weather did you have that spring?

A. It was mostly humid, damp, rainy weather.

Q. You knew that Elgetol had been used in '44 here in the valley only, didn't you? A. Yes.

Q. And you knew that it had been used by some growers as a thinner, and they had noticed that it was a good mildew control?

A. That's right.

(Testimony of Miles Gibson.)

Q. Now, isn't a standard time or recommendation for putting on a mildew spray, whether it be Elgetol or sulphur or something else, in the pink, in the true pink, and in the calyx?

A. That's right.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all, Mr. Gibson.

(Whereupon, there being no further questions, the witness was excused.)

W. B. DOWDY

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. W. B. Dowdy.

Q. And where do you live, sir?

A. I live now here in Yakima.

Q. And have you ever been engaged in the orchard business?

A. Yes, I have, and since 1920, until just a few days ago, when I sold my ranch, just last week.

Q. And where was your orchard located?

A. Three miles northwest of Selah.

Q. What varieties do you have on your orchard?

A. I have Winesaps, Jonathans, Delicious, a few Newtowns, and pears.

(Testimony of W. B. Dowdy.)

Q. Do you have a mildew problem in your orchard?

A. Yes, there is some mildew in 'most all the varieties, but particularly the Jonathans.

Q. Have you ever used Elgetol to help control the mildew?

A. I did in '45.

Q. And what strength of Elgetol did you use?

A. In the pink spray I used a pint and a half.

Q. To a hundred gallons?

A. To the hundred gallons, and in the calyx spray I put in one gallon to the thousand gallon tank, which would be eight-tenths pint; a gallon can in a thousand gallon tank.

Q. And what effect did these two applications of Elgetol have on your orchard?

A. Well, on most of the trees I had a very few apples; very light crop. An occasional tree there would be a fair crop. I got seven hundred boxes that year off of my Jonathans. In '46 I got thirty-five hundred. That's about a comparison.

Q. Thirty-five hundred in 1946, and seven hundred in 1945?

A. That's right.

Q. What did you get in 1944?

A. I don't remember just exactly, but it would be somewheres around three thousand.

Q. Around three thousand. In your opinion, did Elgetol do that damage?

A. Well, if it didn't, I wouldn't know what else did. I'd blame it on the Elgetol.

Q. The injury and burn, that followed immediately the application of the Elgetol?

(Testimony of W. B. Dowdy.)

A. Well, I didn't notice it for several days after I made the application. I couldn't see very much injury before I put on my calyx spray, or I wouldn't have went ahead with it, but it seemed to be all right. I put on the calyx, but I didn't finish the calyx spray before this injury began to show up, and of course I quit immediately.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. McKelvy:

Q. I understand you used one and a half pints in the pink? A. That's right.

Q. And you testified at the Gibson trial that you used one pint in the pink? A. In the pink?

Q. Yes, sir. Didn't I ask you this question—this question was asked by Mr. Hawkins——

A. Well, it seems to me—my memory is that I used a pint and a half.

Q. "What strength of Elgetol did you use?" Answer: "Well, I made two sprays. With the pink I used at the rate of one pint to the hundred." Did you answer that way at that time?

A. Well, that would be ten pints.

Q. Ten pints to a thousand gallon tank. Well, isn't it a fact you don't remember or didn't know exactly what you used?

A. No, I knew exactly at the time what I was using; there's no question about that. It's possible that I may have forgotten now, but it seems to me, my memory was I used a pint and a half in the first cover in the pink.

(Testimony of W. B. Dowdy.)

Q. I see; all right. And you have an orchard that has sort of a perpetual mildew, in the Jonathans, anyway?

A. Well, I've always had mildew in my Jonathans, that's right.

Q. That's what I mean; and you have had to spray quite regularly for it?

A. I spray every year for it.

Q. And you have used sulphur before 1945?

A. I use sulphur, that's right.

Q. And you had heard that Elgetol had been used by some growers in 1944 as a thinner and that it cleaned up mildew, hadn't you?

A. Yes, I first heard of it at the Horticultural meeting that previous winter.

Q. You first heard of Elgetol when you attended the Horticultural meeting here in Yakima in December, 1944?

A. That's right.

Q. And who was talking there, any representative of the California Spray-Chemical Company?

A. Not that I recall now.

Q. Well, other growers were making talks, weren't they?

A. Yes.

Q. Charley Rowe made a talk about it?

A. Yes.

Q. And he said he had fine results with it in 1944?

Mr. Hawkins: I object to this line of testimony; it's going pretty far afield.

The Court: Overrule the objection.

(Testimony of W. B. Dowdy.)

Cross-Examination

(Continued)

Q. You may answer.

A. Well, Charley, as I remember it, was talking about the Elgetol as a thinning spray, and he noticed that it was apparently controlling his mildew, and I figured if it controlled his mildew it might control my mildew.

Q. And Charley Wright said the same thing, made the same kind of a talk, at that same meeting?

A. Well, I don't remember about Charley Wright.

Q. You know who Charley Wright is?

A. Charley who?

Q. Wright.

A. Well, I don't recall him just now. I remember Charley Rowe, particular.

Q. Well, there were other growers talking about it that had used it in 1944, regardless of the name?

A. Well, I remember Charley Rowe, is the one man I remember talking about it.

Q. Now, why were you interested in using Elgetol after you had attended this meeting, instead of sulphur the old stand-by you used for years?

A. Well, there's several reasons for that. Anyone who has used sulphur very much doesn't want to use it if he can possibly find anything else.

Q. Why?

A. Well, it's a very offensive spray to use, in the first place, it's difficult to handle, it's a dirty spray,

(Testimony of W. B. Dowdy.)

and the second reason is that if you use sulphur you can't follow in your calyx or first covers with oil.

Q. Well, did you have any desire to be able to follow with oil?

A. Sure, you want to use your oil as an ovicide for codling moth and codling moth eggs.

Q. Is there something else you could use instead of oil?

A. Well, not as an ovicide, that I know of.

Mr. McKelvy: That's all; thank you, sir.

Mr. Hawkins: I think that's all.

(Whereupon, there being no further questions, the witness was excused.)

[Endorsed]: No. 11634. United States Circuit Court of Appeals for the Ninth Circuit. J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, Husband and Wife, Appellants, vs. California Spray-Chemical Corporation, a Corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed May 22, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11634

J. D. KECK and HARRY K. STAHLER and E.
A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Appellee.

STIPULATION FOR SUPPLEMENTAL
TRANSCRIPT OF RECORD

It Is Hereby Stipulated by and between the parties to the above-entitled causes by and through their respective attorneys, that the United States Circuit Court of Appeals for the Ninth Circuit shall supervise and secure printed as a Supplemental Transcript of Record in the above causes the transcribed stenographic record of evidence of the following named witnesses: Reporter's transcript of evidence excepted by appellant, Record, Pages 169-226; 289-293; 301-335; 347-357, including Robert W. Crews, H. S. Rademacher, Fred C. Meyers, Otto Jones,

Miles Gibson, W. B. Dowdy, Cecil C. Clark, Edward Ketcham, David H. Shuman, Lawrence Liniger, D. W. Brackett, A. J. Beckwith, A. C. Knueppel and the Bill of Particulars on file in said causes; and Plaintiffs' Exhibits B, F, and the label on Exhibit J; and said Supplemental Transcript of Record shall be and remain a part of the record of said causes, and each of them, to the same extent as that heretofore printed and designated "The Transcript of Record"; and costs therefore shall be and become costs taxable in said causes.

Dated August 5, 1947.

/s/ W. R. McKELVY,
SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN.

By /s/ A. P. CURRY.

BROWN & HAWKINS,
By /s/ KENNETH C. HAWKINS.

[Endorsed]: Filed Aug. 11, 1947.

